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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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12 AMERICAN GUARD SERVICES, ) CV 18-05418-RSWL-SS  
13 INC., a California )  
14 corporation, )  
15 Plaintiff, ) ORDER re: Defendant's  
16 v. ) Motion to Dismiss [7]  
17 )  
18 SZERLIP & CO., INC., a New )  
19 Jersey corporation; and )  
20 DOES 1 through 50, )  
21 inclusive, )  
22 Defendants. )

23 Currently before the Court is Defendant Szerlip &  
24 Co., Inc.'s ("Defendant") Motion to Dismiss ("Motion")  
25 [7]. Having reviewed all papers submitted pertaining  
26 to this Motion, the Court **NOW FINDS AND RULES AS**  
27 **FOLLOWS:** the Court **DENIES** Defendant's Motion.

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1 I. BACKGROUND

2 A. Factual Background

3 Plaintiff American Guard Services, Inc.  
4 ("Plaintiff") is a California corporation with its  
5 principal place of business in California. Notice of  
6 Removal, Ex. 1 ("Compl.") ¶ 1, ECF No. 1-1. Plaintiff  
7 is a security services company providing security  
8 officers for businesses, cruise lines, and ports. Id.  
9 ¶ 11. Defendant is a New Jersey corporation with its  
10 principal place of business in New Jersey. Id. ¶ 2.  
11 Defendant is an insurance broker with regard to various  
12 types of insurance, and it allegedly holds itself out  
13 as an expert in insurance coverage for companies in the  
14 security guard business. Id. ¶ 12.

15 Plaintiff began purchasing insurance policies  
16 through Defendant in the early 2000s. Id. ¶ 13. In  
17 May 2006, Plaintiff entered into a Shipboard Security  
18 Services Agreement with Norwegian Cruise Lines to  
19 provide security services aboard Norwegian Cruise Lines  
20 cruise ships. Id. ¶ 14. Plaintiff subsequently  
21 informed Defendant of this agreement. Id. ¶ 15.

22 For the period of September 30, 2010 to September  
23 30, 2011, First Mercury Insurance Co. ("FMIC") issued  
24 Plaintiff a Commercial General Liability policy and a  
25 Commercial Umbrella Liability policy. Id. ¶¶ 16-17.  
26 For the period of March 16, 2011 to March 16, 2012,  
27 Everest National Insurance Company ("Everest") issued  
28 Plaintiff a Worker's Compensation policy. Id. ¶ 18.

1 Defendant was the broker for all three of these  
2 insurance policies, and Plaintiff alleges that  
3 Defendant recommended the coverage included in these  
4 policies based on Plaintiff's business operations. Id.

5 ¶ 19. Defendant did not inform Plaintiff that these  
6 policies would not cover damages an employee suffered  
7 while working on a cruise ship. Id. ¶ 27.

8 On May 22, 2011, one of Plaintiff's employees was  
9 injured while working on a Norwegian Cruise Lines ship.

10 Id. ¶ 20. On April 11, 2012, the injured employee  
11 filed suit against Plaintiff for damages. Id. ¶ 21.  
12 Plaintiff submitted the case to both FMIC and Everest  
13 requesting defense and indemnity based on Plaintiff's  
14 existing insurance policies. Id. On July 2, 2012,  
15 FMIC sent a letter to Plaintiff rejecting Plaintiff's  
16 request for coverage. Id. ¶ 22. FMIC based its denial  
17 of coverage on the employer's liability and workers'  
18 compensation exclusions contained in the Commercial  
19 General Liability policy. Id.

20 On May 21, 2012, Everest informed Plaintiff that  
21 Plaintiff's policy excluded coverage for (1) an  
22 obligation imposed by a workers' compensation system or  
23 similar law, (2) bodily injury to a person in work  
24 subject to the Longshore and Harbor Workers'  
25 Compensation Act, and (3) bodily injury to a person in  
26 work subject to the Federal Employers' Liability Act.  
27 Id. ¶ 23. Despite these exclusions, Everest initially  
28 agreed to defend Plaintiff, subject to a reservation of

1 Everest's right to withdraw the defense and/or deny  
2 coverage. Id. ¶ 24. In June 2015, Everest filed an  
3 action for declaratory relief against Plaintiff in the  
4 U.S. District Court for the Southern District of  
5 Florida, alleging Everest had no duty to defend or  
6 indemnify Plaintiff against the employee's claims. Id.  
7 ¶ 25. The court granted Everest's Motion for Summary  
8 Judgment on May 29, 2016. Id. ¶ 26.

## 9 **B. Procedural Background**

10 Plaintiff filed its Complaint [1-1] on May 23, 2018  
11 in the Los Angeles County Superior Court. Defendant  
12 removed to this Court on June 18, 2018 [1]. Defendant  
13 filed the instant Motion [7] on June 22, 2018.  
14 Plaintiff filed its Opposition [9] on July 23, 2018.  
15 Defendant filed its Reply [12] on July 24, 2018.

## 16 **II. DISCUSSION**

### 17 **A. Legal Standard**

18 Federal Rule of Civil Procedure ("Rule") 12(b)(6)  
19 allows a party to move for dismissal of one or more  
20 claims if the pleading fails to state a claim upon  
21 which relief can be granted. A complaint must contain  
22 sufficient facts, accepted as true, to state a  
23 plausible claim for relief. Ashcroft v. Iqbal, 556  
24 U.S. 662, 678 (2009) (quotation omitted). Dismissal is  
25 warranted for a "lack of a cognizable legal theory or  
26 the absence of sufficient facts alleged under a  
27 cognizable legal theory." Balistreri v. Pacifica  
28 Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988)

1 (citation omitted).

2 "In ruling on a 12(b)(6) motion, a court may  
3 generally consider only allegations contained in the  
4 pleadings, exhibits attached to the complaint, and  
5 matters properly subject to judicial notice." Swartz  
6 v. KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007)

7 (citation omitted). A court must presume all factual  
8 allegations to be true and draw all reasonable  
9 inferences in favor of the non-moving party. Klarfeld  
10 v. United States, 944 F.2d 583, 585 (9th Cir. 1991).

11 The question is not whether the plaintiff will  
12 ultimately prevail, but whether the plaintiff is  
13 entitled to present evidence to support the claims.  
14 Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 184  
15 (2005) (quoting Scheuer v. Rhodes, 416 U.S. 232, 236  
16 (1974)). While a complaint need not contain detailed  
17 factual allegations, a plaintiff must provide more than  
18 "labels and conclusions" or "a formulaic recitation of  
19 the elements of a cause of action." Bell Atl. Corp. v.  
20 Twombly, 550 U.S. 544, 555 (2007).

## 21 **B. Discussion**

### 22 1. Plaintiff's Late-Filed Opposition

23 Pursuant to Local Rule 7-9, Plaintiff was required  
24 to file its Opposition no later than twenty-one days  
25 prior to the hearing on Defendant's Motion.

26 Plaintiff's Opposition was therefore due by July 17,  
27 2018, but Plaintiff did not file its Opposition until  
28 July 23, 2018. Defendant, in addressing Plaintiff's

1 late-filed Opposition, argues that the Court should  
2 disregard the Opposition or deem it waived. However,  
3 Defendant does not explain how it was prejudiced by  
4 this late filing. In light of this, and "based on the  
5 law's strong preference to determine cases on their  
6 merits," Summer v. Berryhill, No. 16-cv-01872-BLF, 2017  
7 U.S. Dist. LEXIS 109841, at \*9 (N.D. Cal. July 14,  
8 2017), the Court will exercise its discretion to  
9 consider the late-filed Opposition and rule on the  
10 merits of Defendant's Motion.

11       2. Statute of Limitations

12       Defendant's primary argument is that Plaintiff's  
13 Complaint should be dismissed because the statute of  
14 limitations bars Plaintiff's Complaint. "A claim may  
15 be dismissed as untimely pursuant to a 12(b)(6) motion  
16 'only when the running of the statute [of limitations]  
17 is apparent on the face of the complaint.'" United  
18 States ex rel. Air Control Techs. v. Pre Con Indus.,  
19 720 F.3d 1174, 1178 (9th Cir. 2013) (quotation  
20 omitted). "In fact, a complaint cannot be dismissed  
21 unless it appears beyond doubt that the plaintiff can  
22 prove no set of facts that would establish the  
23 timeliness of the claim." Supermail Cargo, Inc. v.  
24 United States, 68 F.3d 1204, 1207 (9th Cir. 1995).

25       Plaintiff asserts a negligence cause of action  
26 against Defendant, arguing that Defendant "fail[ed] to  
27 gain the knowledge and information necessary to secure  
28 adequate insurance coverage for" Plaintiff. Compl.

¶ 33. Such a "negligence claim is one for professional negligence and is governed by the two-year statute of limitations set forth in" California Code of Civil Procedure section 339. Hydro-Mill Co. v. Hayward, Tilton & Rolapp Ins. Assocs., Inc., 10 Cal. Rptr. 3d 582, 589 (Ct. App. 2004). A cause of action for professional negligence does not accrue until the plaintiff (1) sustains damage and (2) discovers, or should discover, the negligence. Roger E. Smith v. Shn Consulting Eng'rs & Geologists, 107 Cal. Rptr. 2d 424, 434 (Ct. App. 2001). "The crucial question" is when the plaintiff knew, or should have known, about the defendant's "wrongful conduct and the resulting harm." Hydro-Mill, 10 Cal. Rptr. 3d at 595.

Here, Defendant repeatedly argues that the statute of limitations began to run as early as 2012, when Everest informed Plaintiff that the policy excluded coverage for Plaintiff's employee's injury. However, despite making this statement to Plaintiff, Everest agreed to defend and indemnify Plaintiff. See Compl.

¶ 24. The fact that Everest sent Plaintiff a letter with a reservation of the right to withdraw coverage does not change the fact that, at that time, Plaintiff had not suffered any appreciable harm because Everest still agreed to defend Plaintiff. See Roger E. Smith, 107 Cal. Rptr. 2d at 434 ("[A]n action accrues, and the statute begins to run, as soon as the plaintiff suffers 'appreciable harm' from the breach.").

1 Defendant also argues that the statute of  
2 limitations began to run in June 2015, when Everest  
3 filed an action for declaratory relief against  
4 Plaintiff alleging that Everest had no duty to defend  
5 Plaintiff. However, while Everest may have sought  
6 court intervention to determine its role in  
7 indemnifying Plaintiff, the question of whether Everest  
8 would in fact indemnify Plaintiff was not answered  
9 until the court granted Everest's Motion for Summary  
10 Judgment on May 29, 2016.

11 Typically, the statute of limitations would begin  
12 to run when the insurer, here, Everest, denied coverage  
13 or refused to pay for Plaintiff's employee's damages.  
14 See Hydro-Mill, 10 Cal. Rptr. 3d at 597 (holding that  
15 statute did not begin to run until insurer made an  
16 offer to insured that excluded coverage for some  
17 properties); Butcher v. Truck Ins. Exch., 92 Cal. Rptr.  
18 2d 521, 541 (Ct. App. 2000) ("[T]he fact of any damage  
19 at all was completely uncertain until Truck told  
20 appellants it would not defend them in the Hennefer  
21 action."). However, here, Everest did not deny  
22 coverage. It instead filed an action for declaratory  
23 relief. Therefore, there was still a possibility that  
24 Everest would indemnify Plaintiff, especially if the  
25 court sided with Plaintiff in the declaratory relief  
26 action. No appreciable harm existed until the court  
27 granted Everest's Motion for Summary Judgment on May  
28 29, 2016, thus clarifying that Everest was not required



1 to indemnify Plaintiff. See also Williams v. Hilb,  
2 Rogal & Hobbs Ins. Servs. of Cal., Inc., 98 Cal. Rptr.  
3 3d 910, 924 (Ct. App. 2009) ("Thus until the judgment  
4 was entered, [the plaintiff] sustained no appreciable  
5 harm from the lack of workers' compensation insurance  
6 coverage and, the trial court so found."); Walker v.  
7 Pac. Indem. Co., 6 Cal. Rptr. 924, 926 (Ct. App. 1960)  
8 ("[T]he fact of any damage at all was completely  
9 uncertain until judgment in the personal injury  
10 action."). Accordingly, there is clearly a set of  
11 facts that would establish the timeliness of the claim,  
12 and therefore, Plaintiff's Complaint cannot be  
13 dismissed based on the statute of limitations.

### 14 3. Failure to State a Claim

15 Defendant also half-heartedly argues that  
16 Plaintiff's Complaint fails to state a claim for  
17 professional negligence. However, Defendant does not  
18 take issue with the allegations in the Complaint. It  
19 instead includes declarations and exhibits to its  
20 Motion in an attempt to prove Plaintiff declined  
21 coverage for employees working on boats, thus  
22 preventing a claim for professional negligence related  
23 to the employee's injury on a Norwegian Cruise Lines  
24 cruise ship.

25 "As a general rule, 'a district court may not  
26 consider any material beyond the pleadings in ruling on  
27 a Rule 12(b)(6) motion.'" Lee v. City of L.A., 250  
28 F.3d 668, 688 (9th Cir. 2001) (quotation omitted). In

fact, Rule 12(b)(6) states that when "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment." While the Court may consider documents attached to the Complaint or documents subject to judicial notice without converting a motion to dismiss into a motion for summary judgment, see Lee, 250 F.3d at 688-89, the declarations and documents Defendant attaches to its Motion do not fit within these two exceptions. The Declaration of Wayne Ruben includes statements regarding Defendant's relationship with Plaintiff and includes documents exchanged between the parties. See Decl. of Wayne Ruben in Supp. of Def.'s Mot. to Dismiss, ECF No. 7-2. Therefore, the Court cannot consider these documents without converting this Motion into a motion for summary judgment, which it declines to do at this early stage of the litigation.

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1 Defendant does not challenge the sufficiency of the  
2 allegations of the Complaint, and therefore, accepting  
3 the allegations in the Complaint as true, Plaintiff has  
4 sufficiently pleaded a claim for professional  
5 negligence.

6 **III. CONCLUSION**

7 Based on the foregoing, the Court **DENIES**  
8 Defendant's Motion. Counsel are reminded that  
9 Defendant's Answer to the Complaint is due within 14  
10 days of this order.

11 **IT IS SO ORDERED.**

12  
13 DATED: August 21, 2018

s/ RONALD S.W. LEW

14 **HONORABLE RONALD S.W. LEW**  
15 Senior U.S. District Judge  
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